JAMES EVERARD'S BREWERIES *v.* DAY, PROHIBITION DIRECTOR OF THE STATE OF NEW YORK, ET AL.

EDWARD AND JOHN BURKE, LIMITED, *v.* BLAIR, COMMISSIONER OF INTERNAL REVENUE, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 200 and 245. Argued March 4, 5, 1924.—Decided June 9, 1924.

1. Section 2 of the Supplemental Prohibition Act of November 23, 1921, in so far as it prevents physicians from prescribing intoxicating malt liquors for medicinal purposes, is constitutional. P. 557.
2. This provision does not violate the Tenth Amendment, since it is not an invasion of power reserved to the States. P. 558.
3. It is supported both by the implied power of Congress to make laws necessary and proper for executing powers expressly granted

fourth of a gallon, containing not more than 24 per centum of alcohol, and provides that the vinous and spirituous liquor prescribed for any person within any period of ten days shall not contain more than one-half pint of alcohol.

James Everard's Breweries, the plaintiff in the first case, is a New York corporation. Prior to the passage of the Prohibition Act it had been engaged in the manufacture and sale of beer and other intoxicating malt liquors. After the Treasury Regulations had been amended, it obtained a permit for the manufacture of intoxicating malt liquor for medicinal purposes, and brewed a large quantity of beer, ale and stout for sale to pharmacists for resale on physician's prescriptions. When the Supplemental Act was passed it had on hand a large quantity of these intoxicating malt liquors which it could not thereafter sell in the conduct of its business, and of which it could only dispose, after de-alcoholization, at a heavy loss.

Edward and John Burke, Limited, the plaintiff in the second case, is a British corporation, engaged in bottling and distributing an intoxicating malt liquor known as Guinness's Stout. Prior to the passage of the National Prohibition Act it had maintained a branch of its business in New York. Early in November, 1921, the Commissioner refused it a permit to sell such stout for medicinal purposes because of the pendency in Congress of the Supplemental Prohibition Bill. At the time of the passage of the act it had on hand a large quantity of stout.

Each of these corporations brought a suit in equity in the District Court to enjoin the Commissioner of Internal Revenue and other federal officers from enforcing the provision of the Supplemental Act prohibiting the prescribing of intoxicating malt liquors for medicinal purposes, alleging that it was not authorized by the Eighteenth Amendment and was in conflict with other provisions

of the Constitution.[2] Each of these bills was dismissed by the District Court, for want of equity.[3] The plaintiffs then appealed directly to this Court. Jud. Code, § 238.

The contention that this provision of the Supplemental Act is unconstitutional, is based primarily upon the grounds: That the Eighteenth Amendment merely delegates to Congress the authority to prohibit the traffic in intoxicating liquors for beverage purposes, and the control of the traffic in such liquors for non-beverage purposes is reserved to the several States; that while Congress possesses the incidental power to regulate the traffic in intoxicating liquors for non-beverage purposes so far as is reasonably necessary to make effective the prohibition of the traffic in such liquors for beverage purposes, this incidental power is limited to reasonable regulation and does not extend to complete prohibition; and that the prohibition of prescriptions for the use of intoxicating malt liquors for medicinal purposes is neither an appropriate nor reasonable exercise of the power conferred upon Congress by the Amendment and infringes upon the

[2] In the Everard case the bill prayed that the Supplemental Act be declared unconstitutional; and that the defendants be enjoined from interfering with the plaintiff in manufacturing intoxicating malt liquors for medicinal purposes and selling the same to pharmacists; from interfering with pharmacists in purchasing and physicians in prescribing such liquors for such purposes; and from refusing to issue permits to pharmacists and physicians for such purposes. In the Burke case the bill prayed that the defendants be enjoined from enforcing the act and Treasury Regulations in so far as they prohibited the plaintiff from selling stout to pharmacists for medicinal purposes; from interfering with the plaintiff in making such sales; and from refusing to issue to the plaintiff and to pharmacists and physicians permits for the sale, purchase and prescribing of such stout.

[3] In the Everard case there was no opinion. In the Burke case the opinion was mainly based on the earlier opinion of the same court in *Piel Bros.* v. *Day*, 278 Fed. 223, which had been affirmed by the Circuit Court of Appeals, *per curiam*. 281 Fed. 1022.

legislative power of the States in matters affecting the public health.

It is clear that if the act is within the authority delegated to Congress by the Eighteenth Amendment, its validity is not impaired by reason of any power reserved to the States. The words "concurrent power" as used in the second section of the Amendment "do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them"; and the power confided to Congress, while not exclusive, "is in no wise dependent on or affected by action or inaction on the part of the several States or any of them." *National Prohibition Cases,* 253 U. S. 350, 387. And if the act is within the power confided to Congress, the Tenth Amendment, by its very terms, has no application, since it only reserves to the States "powers not delegated to the United States by the Constitution." See *McCulloch* v. *Maryland,* 4 Wheat. 316, 406; *Lottery Case,* 188 U. S. 321, 357.

We come then to the question whether this act is within the power conferred upon Congress by the Eighteenth Amendment. By its terms the Amendment prohibits the manufacture, sale or transportation of intoxicating liquors for beverage purposes, and grants to Congress the power to enforce this prohibition "by appropriate legislation." Its purpose is to suppress the entire traffic in intoxicating liquor as a beverage. See *Grogan* v. *Walker,* 259 U. S. 80, 89. And it must be respected and given effect in the same manner as other provisions of the Constitution. *National Prohibition Cases,* 253 U. S. 350, 386.

The Constitution confers upon Congress the power to make all laws necessary and proper for carrying into execution all powers that are vested in it. Art. I, § 8, cl. 18. In the exercise of such non-enumerated or "implied" powers it has long been settled that Congress is

not limited to such measures as are indispensably necessary to give effect to its express powers, but in the exercise of its discretion as to the means of carrying them into execution may adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution. *United States* v. *Fisher*, 2 Cranch, 358, 395; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 326; *McCulloch* v. *Maryland*, *supra*, pp. 421, 422; *Ex parte Curtis*, 106 U. S. 371, 372; *Legal Tender Case*, 110 U. S. 421, 440; *In re Rapier*, 143 U. S. 110, 134; *Logan* v. *United States*, 144 U. S. 263, 283; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 712; *Lottery Case*, *supra*, p. 355; *Hoke* v. *United States*, 227 U. S. 308, 323. Furthermore, aside from this fundamental rule, the Eighteenth Amendment specifically confers upon Congress the power to enforce "by appropriate legislation" the constitutional prohibition of the traffic in intoxicating liquors for beverage purposes. This enables Congress to enforce the prohibition "by appropriate means." *National Prohibition Cases*, *supra*, p. 387.

It is likewise well settled that where the means adopted by Congress are not prohibited and are calculated to effect the object intrusted to it, this Court may not inquire into the degree of their necessity; as this would be to pass the line which circumscribes the judicial department and to tread upon legislative ground. *McCulloch* v. *Maryland*, *supra*, p. 423; *Legal Tender Case*, *supra*, p. 450; *Fong Yue Ting* v. *United States*, *supra*, p. 713. Nor may it enquire as to the wisdom of the legislation. *Legal Tender Case*, *supra*, p. 450; *McCray* v. *United States*, 195 U. S. 27, 54; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 141. What it may consider is whether that which has been done by Congress has gone beyond the constitutional limits upon its legislative discretion. *Ex parte Curtis*, *supra*, p. 373.

It is clear that Congress, under its express power to enforce by appropriate legislation the prohibition of traffic in intoxicating liquors for beverage purposes, may adopt any eligible and appropriate means to make that prohibition effective. The possible abuse of a power is not an argument against its existence. *Lottery Case, supra,* p. 363; *Hamilton* v. *Kentucky Distilleries Co., supra,* p. 161. And it has been held that the power to prohibit traffic in intoxicating liquors includes, as an appropriate means of making that prohibition effective, power to prohibit traffic in similar liquors, although non-intoxicating. *Purity Extract Co.* v. *Lynch,* 226 U. S. 192; *Ruppert* v. *Caffey,* 251 U. S. 264.

The ultimate and controlling question then is, whether in prohibiting physicians from prescribing intoxicating malt liquors for medicinal purposes as a means of enforcing the prohibition of traffic in such liquors for beverage purposes, Congress has exceeded the constitutional limits upon its legislative discretion.

In enacting this legislation Congress has affirmed its validity. That determination must be given great weight; this Court by an unbroken line of decisions having "steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt." *Adkins* v. *Children's Hospital,* 261 U. S. 525, 544.

We cannot say that prohibiting traffic in intoxicating malt liquors for medicinal purposes has no real or substantial relation to the enforcement of the Eighteenth Amendment, and is not adapted to accomplish that end and make the constitutional prohibition effective. The difficulties always attendant upon the suppression of traffic in intoxicating liquors are notorious. *Crane* v. *Campbell,* 245 U. S. 304, 307. The Federal Government in enforcing prohibition is confronted with difficulties similar to those encountered by the States. *Ruppert* v.

Caffey, supra, p. 297. The opportunity to manufacture, sell and prescribe intoxicating malt liquors for "medicinal purposes," opens many doors to clandestine traffic in them as beverages under the guise of medicines; facilitates many frauds, subterfuges and artifices; aids evasion: and, thereby and to that extent, hampers and obstructs the enforcement of the Eighteenth Amendment. A provision in a revenue act which tends to diminish the opportunity for clandestine traffic in avoidance of the tax, has a reasonable relation to its enforcement. *United States* v. *Doremus,* 249 U. S. 86, 94.

Nor can it be held that the act is an arbitrary and unreasonable prohibition of the use of valuable medicinal agents.

When the bill was pending in Congress the Judiciary Committee of the House of Representatives held an extended public hearing, in which it received testimony, among other things, on the question whether beer and other intoxicating malt liquors possessed any substantial medicinal properties. Hearings before House Judiciary Committee on H. R. 5033, Serial 2, May 12, 13, 16, 17, 20, 1921. On the information thus received the Committee recommended the passage of the bill. H. R., 67th Cong., 1st sess., Rep. No. 224.[4] And in the light of all the

[4] In its report the Committee said: "The evidence presented to the committee to the effect that beer has never been recognized as a medicine was overwhelming. The United States Pharmacopœia has never listed it as a medicine. One hundred and four of the leading physicians and scientists in the Nation signed the following statement: 'The undersigned physicians of the United States desire to place on record their conviction that the manufacture and sale of beer and other malt liquors for medicinal purposes should not be permitted. Malt liquors never have been listed in the United States Pharmacopœia as official medicinal remedies. They serve no medical purpose which can not be satisfactorily met in other ways, and that without the danger of cultivating the beverage use of an alcoholic liquor.' Several thousand other physicians signed the

testimony Congress determined, in effect, that intoxicating malt liquors possessed no substantial and essential medicinal properties which made it necessary that their use for medicinal purposes should be permitted, and that, as a matter affecting the public health, it was sufficient to permit physicians to prescribe spirituous and vinous intoxicating liquors in addition to the non-intoxicating malt liquors whose manufacture and sale is permitted under the National Prohibition Act.

Neither beer nor any other intoxicating malt liquor is listed as a medicinal remedy in the United States Pharmacopœia. They are not generally recognized as medicinal agents. There is no consensus of opinion among physicians and medical authorities that they have any substantial value as medicinal agents; and while there is some difference of opinion on this subject the question is, at the most, debatable. And their medicinal properties, if any, may, it appears, be supplied by the use of other available remedies. That the opinion is extensively held that the prohibition of prescription of malt liquors is a necessary and proper means to the suppression of the traffic in intoxicating beverages likewise appears from the legislation in many States, under which such prescriptions are not permitted.

The distinction made by Congress between permitting the prescription of spirituous and vinous liquors while prohibiting the prescription of malt liquors is not plainly

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above, or a similar statement, and presented it to the committee. The attorney for the Anheuser-Busch Co. (Inc.) appeared before the committee and called attention to the fact that if beer was permitted as a medicine it would be impossible to enforce the prohibition law. There was only one doctor who appeared before the committee in favor of beer as a medicine, and the New York County Medical Association, the official medical association of New York, denied that he spoke for them in favoring beer for medicinal purposes."

unreasonable or without a substantial justification, based upon their essential differences.

We find, on the whole, no ground for disturbing the determination of Congress on the question of fact as to the reasonable necessity, in the enforcement of the Eighteenth Amendment, of prohibiting prescriptions of intoxicating malt liquors for medicinal purposes. See *Radice* v. *New York*, 264 U. S. 292.

It cannot be said that its action in this respect violated any personal rights of the appellants protected by the Constitution. That it did not take their property in violation of the Fifth Amendment, is clear. *Ruppert* v. *Caffey*, 251 U. S. 264, 301, and cases there cited.

We are unable to say that the provision of the Supplemental Act is an arbitrary and unreasonable exercise of the power vested in Congress by the Eighteenth Amendment or that it is not "appropriate legislation" for its enforcement.

The decrees of the District Court are

Affirmed.